

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

76-1499

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PAS

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

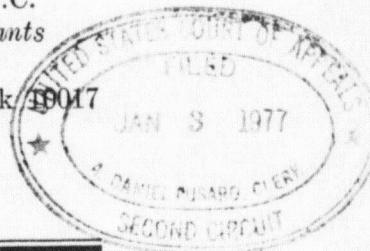
NICHOLAS DEMETROULES and NMD FILM
DISTRIBUTING Co., Inc.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX

KASSNER & DETSKY, P.C.
Attorneys for Appellants
122 East 42nd Street
New York, New York 10017



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A1

Relevant Docket Entries.

BEST COPY AVAILABLE

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

John T. Curtin

CR - 74 - 162

| TITLE OF CASE | | | | ATTORNEYS | | |
|--|------------|------|---------------------|---------------------------------|-------|--|
| THE UNITED STATES | | | | For U.S.: | | |
| vs. | | | | Theodore Burns, AUSA | | |
| NICHOLAS DEMETROULES and NMD FILM DISTRIBUTING CO. INC. | | | | U.S. Courthouse | | |
| knowingly did use the Greyhound Bus Company, a common carrier, for carriage in interstate commerce of an obscene motion picture film, in violation of Title 18, United States Code, Section 1462 | | | | Buffalo, N.Y. 14202 432-3487 | | |
| | | | | For Defendant: | | |
| | | | | Detsky, Chanin Building | | |
| | | | | 122 E. 42nd St., New York | | |
| | | | | New York 10017 | | |
| | | | | 661-8190 | | |
| | | | | On Appeal: | | |
| Offense: 12/5/1973 1 Ct. | | | | Herbert Kazner & Seymour S. | | |
| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. | |
| J.S. 2 mailed | Clerk | | | | | |
| J.S. 3 mailed | Marshal | | | | | |
| Violation | Docket fee | | | | | |
| Sec. 1462 | | | | | | |

| DATE | PROCEEDINGS |
|----------|---|
| 1974 | |
| April 25 | Filed Indictment |
| April 25 | J.S. 2 made (Nicholas Demetroules) |
| May 7 | No appearance for the Deft. Adj. to 5/14/1974 for arraignment before the Magistrate. |
| May 9 | Filed Ct. Steno's minutes of 5/7/1974 |
| May 14 | Proceedings before the Magistrate - Atty. Paul Warburgh, of counsel for Kazner & Detsky, 122 East 42nd St. N.Y., N.Y. ; Not guilty pleas entered for both defts.; Adj. to 6/4/1974 for discovery motions and/or status report. Mr. Demetroules released on his own recog. |
| May 20 | Filed Ct. Steno's minutes of 5/14/1974 |
| June 4 | Proceedings before the Magistrate - Motions/Status - No appearance for Deft. Demetroules Adj. to 6-18-74 , 10:30 a.m. for Govt.'s respond to Deft's request for discovery. |
| June 18 | Proceedings before the Magistrate - No appearance for Deft. Nicholas Demetroules - Govt. requested an adj. for response to deft's request for discovery. Adj. to 7/2/1974 for Govt's response. Set for argument of motions and status report on 7/9/1974-- |

Relevant Docket Entries.

"B"

| DATE | PROCEEDINGS |
|----------|---|
| 1974 | |
| July 2 | Proceedings before the Magistrate - No appearance for Deft. Govt.'s response to discovery request will be filed today for Deft. Demetroules. |
| July 9 | Proceedings before the Magistrate - No appearance for Deft. Govt. advises it has responded to Deft.'s informal discovery but did not answer all requests. All further discovery motions of Deft. are to be filed by 7-15-74. Govt. to respond by 7-22-74. Argument of motions on 7-30-74 at 10:30 a.m. |
| July 23 | Proceedings before the Magistrate - No appearance for deft. Govt. advised the court that no motions have been filed. Case to go to Judge Curtin. |
| July 26 | Filed Govt's motion to move action for trial. |
| Sept. 9 | Status report. No motions to be made by deft. Court directs case be placed on the trial calendar. |
| Dec. 3 | Filed three subpoenas - Roger Parsons, served 11/25/74; Joel Montague, Joseph Hecket, served 11/29/74; and subpoena (D.T.) - T.G. Mawyer, served 11/27/74 |
| Dec. 5 | Filed subpoena - Vincent Martina, ret. unexecuted. New subpoena issued on 12/3/74 for 12/9/74 |
| Dec. 6 | Filed subpoena - Vincent Martina, ret. unexecuted; and subpoena ticket Benjamin Wray, served 11-26-74 by the Southern Dist. of N.Y. |
| 1975 | |
| Mar. 10 | Filed Deft. Nicholas Demetroules's waiver of right to speedy trial |
| Mar. 11 | Filed letter dated 3/10/75 from AUSA Theodore J. Burns, to the Court - informing the Court that the Govt. is requesting authority from the Dept. of Justice to move for dismissal of the Indictment against Nicholas Demetroules, after deft. corporation NMD Films Distributing Co. had entered a plea of guilty, to the Indictment, and had been sentenced thereon; and that the Govt. had also requested that the Deft. Nicholas Demetroules sign a Waiver of "Right to Speedy Trial," which has been filed with the Clerk of the Court on March 10, 1975 -- |
| Sept. 22 | Motion by David Jay to withdraw as local counsel for deft. Adj. to 10-1 |
| 1975 | copy of |
| Sept. 23 | Filed/letter dated 9/22/75 from Atty. David Jay, to Seymour Detsky, Esq. counsel for defts., re Mr. Jay's continuing to act as counsel for Mr. Detsky in this Dist. etc., for the criminal matters in Cr-1973-183 and Cr-1974-162 (filed in Cr-1973-183) |
| Oct. 14 | Motion to withdraw as local counsel. Motion withdrawn |
| 1976 | |
| June 8 | Filed defendants notice of motion for an Order dismissing the Indictment for failure to grant defendants a speedy trial, etc., ret. 6/8/76 |
| June 8 | Filed Govt's response affidavit in opposition to Defendants' motion to dismiss the Indictment |
| June 8 | Government moves case ready for trial, whereupon at the request of of the defts., trial is adj. until 7/20/76. Defts. move to dismiss indictment for lack of a speedy trial. Submitted. |
| June 11 | Filed subpoena Joseph Hecket - served 6-8-76. |
| June 28 | Filed subpoena Vincent Charles Martina returned no service. Filed Order denying defts' motion-to-dismiss; Jury selection is set for 7/20/76--Curtin, J. |
| July 12 | Filed subpoena- Joel John Montague-returned no service. |
| July 20 | Govt. moves case ready for trial, Deft. Demetroules; whereupon the jury is duly empanelled; Trial is adj. until 8/5/76 Deft. Demetroules enters a plea of not guilty to the indictment |

Relevant Docket Entries.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

Nicholas Demetroules and NMD Film Distributing Co., Inc.
74 162

Yr.

Docket No.

Def.

| DATE 1976 | PROCEEDINGS (continued) (Document No.) | V. EXCLUDABLE DELAY (a) (b) (c) (d) | | | |
|--------------|--|--|--|--|--|
| 8/11/76 | trial continues from 7/20/76 with the same appearances & jury with the exception that AUSA Theodore Burns replaces AUSA Roger Williams who was present for jury selection. Witnesses are sworn. Trial is adj. until tomorrow. | | | | |
| 8/12/76 | Govt. Filed stipulation-re/exhibits 10, 11, 12, 13, 14, 15 and 16, produced by Nicholas M. Demetroules to the Grand Jury, as the Court Reporter Jacques Stehlin who transcribed the proceedings would testify. | | | | |
| 8/13/76 | Filed subpoena Ticket - NMD Film Distributing Co., Inc. , 8/4/76 | | | | |
| 8/12/76 | Trial continues from yesterday with the same appearances & jury. Court opens in a motion picture film exhibition room at 498 Pearl St., Buffalo, N.Y. to view a film entitled "The Healers". After viewing the film, the court is adj. until 1:15 P.M. back in the court room. The Government rests. Deft. moves to dismiss the indictment. Motion denied. Trial is adj. until tomorrow. | | | | |
| 8/13/76 | Trial continues from yesterday with the same appearances & jury. Court rules on requests to charge. Deft. moves to dismiss the indictment against both defendants because they failed to prove a prima facie case. Motion denied. Attorneys sum up - trial is adj. until 8/16/76. | | | | |
| 8/16/76 | Trial resumes from 8/13/76 with same appearances and jury. Jury retires to deliberate. The jury returns-with the following verdict: Deft. is guilty on both counts as charged in the indictment. This applies to both defts. Sentence is deferred 10/4/76 | | | | |
| 9/13/76 | Filed Order that the time to urge motion for a new trial is extended to 10/4/76; the date of argument of defendant's motion. U.S. Atty. is directed to respond to motion for a new trial and motion for judgment of acquittal made at the close of the evidence, not later than 9/20/76--CURTIN, J. | | | | |
| 9/13/76 | Filed Deft's motion for a new trial | | | | |
| 9/17/76 | Filed Government's response to defendants' motion for a new trial and judgment of acquittal | | | | |

(OVER)

Relevant Docket Entries.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

" K "

| DATE 1976 | PROCEEDINGS (continued) (Document No.) | V. EXCLUDABLE DELAY | | | |
|--------------|--|---------------------|-----|-----|-----|
| | | (a) | (b) | (c) | (d) |
| 9/20/76 | Return date for Briefs. Submitted. | | | | |
| 10/12/76 | Motion by Deft. Demetroules to dismiss the Indictment. Motion denied. For sentence: Deft. Nicholas Demetroules fined \$2,000; Deft. NMD Film Distributing Co. fined \$2,000. Fines to be paid within 30 days. Curtin, J. Filed defts. notice of appeal | | | | |
| 10/12/76 | | | | | |
| 10/19/76 | Filed Judgment | | | | |
| 10/21/76 | copy of notice of appeal mailed to CCA, form A and copy of docket entries. | | | | |
| 11/1/76 | deft's Filed/motion for extension of time for the payment of fines imposed 10/12/76, until 30 days after appeal is decided, with the Court's endorsement on motion granting extension-CURTIN, J. | | | | |
| 11/10/76 | Filed Ct. steno's transcript of the proceedings of trial commencing on 7/20/76 | | | | |
| 11/11/76 | Filed Deft's request to charge | | | | |
| 11/11/76 | Filed Govt's request to Charge | | | | |
| 11/11/76 | Filed Govt's Suppl. request to Charge | | | | |

Indictment.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-VS-

NICHOLAS DEMETROULES and
NMD FILM DISTRIBUTING CO., INC.NOVEMBER 1973 SESSION ~~Term~~

No.

76 102

Vio. Title 18, U.S.C.,
§1462COUNT I**The Grand Jury Charges:**

On or about the 5th day of December, 1973,
in the Western District of New York, NICHOLAS DEMETROULES
and NMD FILM DISTRIBUTING CO., INC., knowingly did use
the Greyhound Bus Company, a common carrier, for carriage
in interstate commerce from the State of New Jersey to
the State of New York, of an obscene motion-picture film,
entitled, "The Healers": in violation of Title 18,
United States Code, §1462.

JOHN T. ELFVIN
United States Attorney

A TRUE BILL:

Richard S. Ratt
Foreman

1 PROCEEDINGS: August 16, 1976, 9:45 a.m.

2 APPEARANCES: As before noted.

3

4 (Defendant present.)

5 (Jury present.)

6

7

CHARGE OF THE COURT

8

9 THE COURT: I believe we are all here now, Mr.
10 Detsky, Mr. Demetroules, Mr. Burns and
11 the Jury.

12 Ladies and gentlemen, I hope you all
13 had a pleasant weekend and now we are
14 back on the case. It will be my obliga-
15 tion to charge you on the law at this
16 time to the best of my ability. It is
17 your job to take the law as I charge it
18 to you and to apply it to the facts which
19 you find from the evidence in the case,
20 all the exhibits, the picture itself,
21 what you recall from the viewing of it,
22 the testimony of the witnesses. In this
23 case, we have the testimony of the two
24 expert witnesses that came in here. You
25 should certainly consider their testimony

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1 and give it such consideration as you
2 believe ought to be received under the
3 facts and the law.

4 It is your job to go to the jury
5 room and deliberate. That is to give
6 your reasoned, conscientious views of
7 the facts and the law to your fellow
8 jurors and in an objective, dispassionate
9 way; to listen to the same kind of con-
10 siderations coming from them. You must
11 remember that you cannot decide this case
12 based upon any consideration of bias or
13 prejudice or sympathy or some idea of
14 what the sentence will be. The law
15 provides that sentences in criminal cases
16 in our country for the most part are
17 determined by the Court and that is the
18 case here and that is something which
19 should not enter your mind or your con-
20 sideration.

21 In this case on the one hand, you
22 must, as far as you can, - it is a
23 dilemma. I mean as a juror, you certainly
24 act as a person and you cannot leave out, -
25 for me to say that you must forget about

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1 all of your own experiences and common
2 sense and so forth would be an impossi-
3 bility, but you are not here to exercise
4 your individual view of what should be
5 done about this case, but you are here
6 to listen to the evidence and determine
7 what community standards are under the law
8 as I charge it to you so that it may be
9 that you may say "As an individual person,
10 my judgment is so and so, but as I look
11 at the law and as I look at what the
12 Court said, I find that the Government
13 has failed to prove its case beyond a
14 reasonable doubt", and if you determine
15 that, then you would then vote to acquit.

16 In one sense during the course of
17 the trial I have said several times that
18 you were here to determine the issues as
19 far as this particular film is concerned.
20 In one sense, we cannot compare one film
21 with another, the fact that other films
22 may be shown or may not be shown. It
23 simply is not the issue. On the other
24 hand, it may have something to do with
25 what are the community standards in this

1 Western New York area so that to that
2 extent, what has been done other places
3 and other times and in places in this
4 community may be appropriate for you to
5 think about.

6 We start off with the proposition,
7 and some of these thoughts I have given
8 to you before and if I have related to
9 them before, you are to consider them as
10 part of the charge. Whatever was said
11 during jury selection or during the course
12 of the trial, you should keep in mind as
13 part of my official charge to you. Some
14 of the things I have said to you in an
15 informal way and I will repeat them now
16 maybe in a more formal fashion, but
17 whether said once or said a number of
18 times, it is all important for your
19 consideration.

20 We know that the defendant in any
21 criminal case is presumed innocent and
22 in this case, both the individual
23 defendant and the corporate defendant
24 are presumed innocent. You will have
25 two verdicts here, one for the individual

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1 and one for the corporate defendant.
2 We will send to you in the jury room the
3 indictment as a guide only. It is
4 brief, but we will send it to you. You
5 are to keep in mind that the indictment
6 itself is no evidence at all of any
7 criminal conduct on the part of either
8 defendant. It is to be an aid to the
9 defendant so that he can meet the charge
10 placed against him, know what he is charged
11 with and to be sure he is not charged
12 again for the same crime in a subsequent
13 criminal proceeding. That is the purpose
14 of the indictment. It is no evidence at
15 all.

16 When you go to the jury room, it is
17 a good idea to pick one of your number as
18 your foreman to be spokesman if you come
19 back into court or to address a note to
20 the Court if you have any question and if
21 you do have a question about fact or law,
22 that is the way to proceed. Write a note,
23 give it to the marshal and he will deliver
24 it to me and we will have you back up and
25 we will discuss it. Some discussions may

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WESTERN DISTRICT OF NEW YORK

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1 be very brief and others may go on for
2 some time. I think maybe you were in
3 court the other day when the jury came in
4 and had a question about some of the
5 exhibits which weren't sent to them or
6 perhaps they had a question about reading
7 the summations. Some things we can do
8 for you and some things we cannot do for
9 you, but if you do have a question, make
10 sure that you write it out and send it
11 to me and in that way, we will have a
12 clear understanding, you and I, about what
13 we are supposed to do.

14 The defendants here are presumed
15 innocent until you are convinced beyond
16 a reasonable doubt, by legal and compe-
17 tent evidence that the defendant is
18 guilty of the offense charged and that
19 determination as to each can only come
20 about through unanimous vote of the jury.
21 This is not a situation where a majority
22 counts. It must be by unanimous vote
23 before you can make a verdict of guilty.
24 This burden of proving the defendant
25 guilty beyond a reasonable doubt rests

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WESTERN DISTRICT OF NEW YORK

1 with the Government at all times. It
2 never shifts to the defendant. In order
3 to sustain its burden, the Government
4 must present proof which is sufficiently
5 strong to convince each juror of a defend-
6 ants guilt beyond a reasonable doubt.
7 This requirement that the prosecution
8 prove a defendant guilty beyond a reason-
9 able doubt extends to every essential
10 element of the crime charged against each
11 defendant.

12 The law does not compel a defendant
13 in a criminal case to take the witness
14 stand and testify and no presumption of
15 guilt may be raised and no inference of
6 any kind may be drawn by the failure of
17 the defendant to testify in any criminal
18 case and that, of course, extends to
19 this case. I charge you the fact that
20 the defendant did not take the stand and
21 testify may not enter into your delibera-
22 tions and should not be mentioned or
23 given any consideration by you in any
24 fashion.

25 The law, as I explained to you, does

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1 not impose upon the defendant of offer-
2 ing any explanation. In this case, we
3 did have the testimony of the witnesses.
4 The defendant chose to put the witnesses
5 on and you may consider their testimony
6 as part of all the evidence in the case
7 one way or another, but there is no
8 obligation for him to do that.

9 We talked about reasonable doubt.
10 What is a reasonable doubt. It is a fair
11 doubt based upon reason and common sense
12 and arising from the state of the evidence.
13 It is rarely possible to prove anything
14 to an absolute certainty. Proof beyond
15 a reasonable doubt, therefore, is
16 established if the evidence is such as
17 you would be willing to rely and act upon
18 in the most important of your own affairs.
19 A defendant is not to be convicted on
20 suspicion, conjecture, surmise, guess,
21 whimsy, any consideration like that.
22 It must be on the evidence. A reasonable
23 doubt may arise not only from the evidence
24 produced, but also from the lack of
25 evidence.

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1 Since the burden is upon the
2 prosecution to prove the accused guilty
3 beyond a reasonable doubt of every essen-
4 tial element of the crime charged, a
5 defendant has the right to rely upon
6 failure of the prosecution to establish
7 such proof.

8 A defendant may also rely upon
9 evidence brought out on cross examination
10 of witnesses for the prosecution. The
11 law does not impose upon a defendant
12 the duty of producing any evidence. A
13 reasonable doubt is such a doubt as is
14 based upon reason and as appeals to your
15 power of logic. It is a doubt arising
16 out of something tangible in the evidence
17 in the case or something lacking in the
18 case. If you feel uncertain and not
19 fully convinced that a defendant is guilty
20 of the crime charged and you believe you
21 are acting in a reasonable manner and you
22 believe a reasonable man or woman in any
23 matter of like importance would hesitate
24 to convict because of such doubt as you
25 have, that is a reasonable doubt to the

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1 benefit of which the defendant is
2 entitled. If you have such a doubt, you
3 must acquit.

4 In order to determine facts in the
5 case, we turn to the testimony of the
6 witnesses and, of course, as to the
7 exhibits which are in evidence. In that
8 regard as far as the witnesses who have
9 testified, you should keep the following
10 in mind: You should carefully scrutinize
11 the testimony given, the circumstances
12 under which each witness has testified
13 and every matter in evidence which tends
14 to show whether the witness is worthy
15 of belief. Consider the witness'
16 intelligence, motive, state of mind,
17 demeanor and manner while on the stand.
18 Consider the witness' ability to observe
19 the matters as to which he has testified
20 and whether he impresses you as having
21 an accurate recollection in these matters.
22 Consider any relation which the witness
23 may have to either side of the case; how
24 he may be affected by the verdict and the
25 extent to which if at all the witness is

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1 either supported or contradicted by other
2 evidence in the case.

3 Inconsistencies or discrepancies
4 in the testimony of a witness or between
5 the testimony of different witnesses may
6 or may not cause you to discredit such
7 testimony. In weighing the effect of a
8 discrepancy always consider whether it
9 pertains to a matter of importance or
10 an unimportant detail and whether the
11 discrepancy results from innocent error
12 or intentional falsehood.

13 In this case, to summarize the
14 indictment, it charges that on or about
15 the fifth day of December, 1973, in this
16 Federal District, the defendants
17 Nicholas Demetroules and NMD Film
18 Distributing Co., Inc., knowingly used
19 the Greyhound Bus Company for carriage
20 in interstate commerce from the State of
21 New Jersey to the State of New York of
22 an obscene motion picture film entitled
23 "The Healers", a violation of Section
24 1462 of Title 18. That section in part
25 reads as follows: "Whoever knowingly

1 uses any express company or other common
2 carrier for carriage in interstate or
3 foreign commerce any obscene, lewd,
4 lascivious or filthy motion picture film
5 or other matter of indecent character,
6 shall be guilty of an offense against
7 the laws of the United States".

8 In the United States, we have what
9 we call the First Amendment and it is
10 most important we all recognize that the
11 First Amendment to our Constitution
12 guarantees to all of us the right to
13 express our opinions and ideas freely.
14 This is a most important concept. In
15 the exercise of the Constitutional Right
16 to free expression which all of us
17 enjoy, sex may be portrayed and the
18 subject of sex may be discussed freely
19 and publicly so long as the expression
20 does not fall within the area of obscenity.
21 Our Constitution simply does not protect
22 the interstate transportation of obscene
23 material, but remember, it is the obliga-
24 tion of the Government to prove this,
25 the fact that these materials are obscene

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1 beyond a reasonable doubt. That is one
2 of the elements which the Government is
3 obliged to prove.

4 It is not the purpose of the laws
5 regulating obscenity to subject an indi-
6 vidual to prosecution for transportation
7 of obscene materials unless these
8 materials depict patently offensive
9 sexual conduct.

10 In order to prove this case, the
11 Government must prove beyond a reasonable
12 doubt the following essential elements;
13 first, that the defendant or defendants
14 used the Greyhound Bus Company, a common
15 carrier, to transport the motion picture
16 film "The Healers" in interstate commerce
17 from the State of New Jersey to the
18 Stat of New York. In that regard, I am
19 not going to review all of the evidence
20 in the case. It has been a short case.
21 You remember the testimony of Mr. O'Rourke
22 and the exhibits which are before you
23 about the practices of the Greyhound
24 Bus Company. You will also keep in mind
25 the cross examination and the argument of

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WESTERN DISTRICT OF NEW YORK

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1 Mr. Detsky but from looking at these
2 documents and considering the testimony,
3 considering the bills of lading, the
4 other documents which are in the case,
5 it is up to you to make the decision
6 whether or not this film was transported
7 in interstate commerce from New York to
8 New Jersey to Buffalo. It may be simply
9 happenstance or it may be the fact that
10 the matter was routed there. That has
11 nothing to do, the fact that Mr.
12 Demetroules or another person shipping an
13 article was not aware of the route the
14 bus was going to take unfortunately is
15 of no assistance to him because if, in
16 fact, you find that this material, - it
17 was the intention of the person to ship,
18 and you find the other elements are
19 covered, and that the bus company did,
20 in fact, carry them through New Jersey
21 back to New York, then the interstate
22 aspect of this case is satisfactorily
23 taken care of.

24 The Government must also establish,
25 beyond a reasonable doubt, that the

1 motion picture film "The Healers" is
2 obscene, lewd, lascivious or filthy. I
3 will give you further definition of what
4 these words mean as we go on. Thirdly,
5 that the defendant or defendants did the
6 acts charged in the indictment knowingly.
7 Again, further definition will be required
8 as we go on.

9 What do we mean by the word "obscene".
10 As used in Section 1462, the word
11 "obscene" is limited to words which taken
12 as a whole, appeals to the prurient
13 interest in sex, which portrays sexual
14 conduct in a patently offensive way and
15 which taken as a whole do not have serious
16 literary, artistic, political or scienti-
17 fic value. In determining whether the
18 film is obscene, you should answer the
19 following questions:

20 (a) Whether the average person
21 applying contemporary community standards
22 and contemporary community standards are
23 the standards which you find exist in
24 the Western District of New York, -
25 would find that the work taken as a whole

1 appeals to the prurient interest, and
2 secondly, whether the work depicts or
3 describes sexual conduct in a patently
4 offensive way and whether the work taken
5 as a whole lacks serious literary, artistic,
6 political or scientific value.

7 The following are some examples of
8 obscenity:

9 One, patently offensive representa-
10 tions or descriptions of ultimate sex
11 acts, normal or perverted, actual or
12 simulated.

13 Two, patently offensive representa-
14 tions or descriptions of masturbation and
15 lewd exhibition of the genitals.

16 If, pursuant to the instructions I
17 have already given you, you should find
18 that the movie "The Healers" contains
19 prurient and patently offensive repre-
20 sentations or descriptions of sexual
21 conduct, then you may find the movie
22 obscene unless you determine that the
23 film has serious literary, artistic,
24 political or scientific value.

25 In determining whether the film taken

1 as a whole appeals to the prurient inter-
2 est, you should apply the contemporary
3 community standards within the Western
4 District of New York. That is, the
5 seventeen western most counties in New
6 York State which make up this judicial
7 district and, of course, ladies and
8 gentlemen, you are all from the Western
9 New York community.

10 We have talked about the conscience
11 of the community, contemporary community
12 standards. In determining the common con-
13 science of the community, you are to
14 consider the community as a whole, men
15 and women, the average person from all
16 walks of life and in all sections of the
17 Western New York community. We are not
18 here to apply the standard of either the
19 least sensitive or the most sensitive
20 person. We are here to apply the standard
21 of the average person as you find him to
22 be in the community. I suppose that
23 sometimes you say the average person
24 never really exists. You know, what is
25 the average American city, but that is

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1 a job, a task which you are going to
2 wrestle with. In applying this test, the
3 film must be measured by contemporary
4 or current standards. That is the
5 standards of the entire community, the
6 seventeen counties in Western New York
7 must be considered in determining the
8 limits of candor in the depiction or
9 representation of sex which are acceptable
10 in this community.

11 Contemporary community standards are
12 set by what is, in fact, accepted in the
13 community as a whole and it is not what
14 you like or dislike personally, but what
15 is it you find are accepted as the
16 standards for the community as a whole.
17 That is to say by society at large, all
18 people in general in the whole community
19 and not by what some individual groups
20 of persons may believe the community as
21 a whole ought to accept or refuse to
22 accept.

23 We are not here as reformers one
24 way or another to have this thing move
25 ahead in one fashion or to go in some

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1 other lane but we are here to determine
2 from the facts in this case whether or
3 not the community standards which you
4 find to have been in effect here in 1973
5 make this film beyond the line which has
6 been drawn by the community as a whole.

7 In this case, you will note that the
8 indictment charges that defendants knowing-
9 ly used the Greyhound Bus Company to
10 carry an obscene motion picture film.
11 In that regard, generally speaking, an
12 act is done knowingly if done voluntarily
13 and intentionally and not because of
14 mistake or accident or other innocent
15 reason. The purpose of adding the word
16 "knowingly" was to be sure that no one
17 would be convicted for an act done because
18 of mistake or accident or other innocent
19 reason. None of us in this kind of a
20 case or no defendant should be convicted
21 because of simple carelessness or negli-
22 gence, but you may find that defendants
23 here acted knowingly if they had knowledge
24 of the material in "The Healers" and that
25 they knew the character and nature of

1 the materials and that they knowingly
2 shipped the materials and that they knew
3 they were going to go from Buffalo to
4 New York, - or from New York to Buffalo,
5 I should say. Putting that around in
6 another fashion, we may put it this way:
7 Another of the essential elements of
8 the crime which the Government must prove
9 beyond a reasonable doubt is the element
10 of scienter or knowledge. That is, that
11 the defendants knew the contents of the
12 film which was transported in interstate
13 commerce.

14 The Government does not have the
15 obligation of showing that the defendants
16 knew that the contents of the film were,
17 in fact, obscene if you determine whether
18 or not, in fact, that the film was
19 obscene. Therefore, if you find beyond
20 a reasonable doubt that the defendants
21 knowingly transported in interstate
22 commerce the film in question and that
23 they knew the contents of the film, -
24 that is, that they knew what the film
25 actually was and if you find beyond a

1 reasonable doubt that the film was, in
2 fact, obscene within the meaning of the
3 other instructions, then you may find
4 the defendant had the requisite knowledge
5 as we call it in the law.

6 It is not necessary to find a
7 defendant guilty in this kind of a case
8 that he would know beforehand that a
9 court of law would hold that the picture
10 was, in fact, obscene, but what he is
11 obliged to know is what is the film
12 about, what is the theme of the film,
13 what did the film show and again, just
14 to call to your attention, - I am not
15 determining any facts, - there were
16 the various fliers and brochures and
17 so forth which were put out by the, -
18 according to the argument of the
19 Government, - by the Defendant which
20 indicated that he knew what the film had
21 to say, what the film was about and if
22 you find beyond a reasonable doubt that
23 he, in fact, did not know what the film
24 was about and then under the law that,
25 as I charge it, you find, in fact, that

1 the film was obscene, then this element
2 of the crime charged is satisfied, but
3 remember in all of these things, it is
4 the obligation of the Government to prove
5 that element of the crime charged beyond
6 a reasonable doubt.

7 Before we discuss words such as
8 "prurient interest", - before we get to
9 that, perhaps there are some other things
10 I should tell you. In this case here, we
11 have various steps, the film, when you
12 say, for example, that something moves
13 in interstate commerce, it is not
14 necessary that a defendant in a case like
15 this actually get in the bus and drive
16 it. We, of course, know that because in
17 our community nowadays as we take a
18 letter and we mail the letter, we know
19 that the post office is going to carry it
20 so when we put the film, if you find that
21 the film here was purposely placed in
22 travel by the defendant, that is sufficient.
23 The guilt of the defendant may be es-
24 tablished without proof that the defend-
25 ant personally did every act constituting

1 the offense charged. The law provides
2 that whoever willfully causes an act
3 to be done which is directly performed
4 by him or another would be an offense
5 against the United States, he is
6 punishable as a principal. In other
7 words, every person who willfully par-
8 ticipates in the commission of a crime
9 may be found to be guilty of an offense.
10 Participation is willful if done
11 voluntarily and intentionally and with
12 a specific intent to do something the
13 law forbids or with a specific intent to
14 fail to do something the law requires
15 to be done. That is to say with a bad
16 purpose either to disobey or to disregard
17 the law.

18 One of the defendants in this case
19 is a corporation. A corporation is a
20 legal entity, a person, and a corporation
21 may be found guilty of a criminal offense.
22 A corporation, of course, may only act
23 through the actual persons who are known
24 as its agents. In general, any agent or
25 representative of a corporation who has

1 adequate authority may bind the corpora-
2 tion by his acts, declarations and
3 omissions. In order to find a corpora-
4 tion defendant guilty, you must find that
5 all of the essential elements of the
6 offense as set out in these instructions
7 are present as to the corporation in the
8 form of acts or omissions of agents of
9 the corporation within their authority.
10 The scope of authority of these agents
11 is a question of fact for you to decide
12 just as the other fact questions in the
13 case.

14 Although a corporation may be held
15 liable on the basis of an act or omission
16 of any agent possessing adequate author-
17 ity, a higher standard of proof is re-
18 quired for individual defendants. In
19 general, an individual defendant may be
20 held criminally liable on the basis of
21 an act or omission of another person
22 only if it appears beyond a reasonable
23 doubt that he willfully ordered or
24 directed or willfully authorized or
25 consented to the acts or omissions in

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question.

1
2 In this case, there is no question
3 that Mr. Demetroules had nothing to do
4 with the camera work, he wasn't the
5 producer or the director, but you may
6 find from all of the, - he is not charged
7 with producing or directing the film,
8 but he is charged and you are to keep
9 your eye on what the charge is, he is
10 charged with knowingly using the bus
11 company for transport of this film from
12 the State of New Jersey to New York.

13 We had here two expert witnesses in
14 this case and as far as their testimony
15 is concerned, you should keep the follow-
16 ing in mind: All the notions I gave to
17 you first of all about witnesses gener-
18 ally, their ability to observe, their
19 interest in the outcome of the litiga-
20 tion, their demeanor and manner while on
21 the stand, all of those things may be
22 considered by you. Furthermore, you
23 should keep in mind that usually the
24 rules of evidence do not permit witnesses
25 to testify as to opinions or conclusions.

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1 An exception to this rule exists as
2 to those whom we call expert witnesses.
3 They are witnesses who, by education and
4 experience, have become expert in some
5 art, science, profession or calling and
6 may state an opinion as to relevant and
7 material matters in which they profess
8 to be expert and they also may state
9 their reasons for the opinion. I am sure,
10 ladies and gentlemen, that most of you
11 here are expert in one field or another.
12 A person is an electrician and has had
13 years of experience in doing electrical
14 work, he may be called, if there is a
15 problem in a case to testify as to, for
16 example, how a house should be wired or
17 how a particular kind of complicated
18 ventilating system should be wired, some-
19 thing along that line. In any case,
20 whether the man is an electrician or
21 whether he is, as in this case, the
22 professors who have done some study and
23 work in the field, in order to evaluate
24 that man's testimony, you should consider
25 his background, his education, his experi-
ence in the field, his standing in the

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1 field and all of those things and in
2 addition, you must also consider his
3 understanding of the facts in the case.
4 Does his understanding of the facts in
5 the case square with your understanding
6 of the facts. That is for you to deter-
7 mine because just as if an electrician
8 came in to testify about how to wire a
9 house and the plans submitted to him were
10 different from the plans at issue,
11 naturally, of course, you would say
12 "He really was not familiar with the
13 problem at hand because the facts were
14 different". It is your job to listen to
15 the testimony of the witnesses, keeping
16 in mind your recollection of what the
17 film was about and if your recollection
18 of what the film presented was the same
19 as the recollection of the experts, then
20 that would mean that as far as his con-
21 clusions, you may, depending upon his
22 education and his experience, you may come
23 to certain conclusions based upon his
24 testimony. However, if you should find
25 the facts to be different from what he

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1 found the facts then you may disregard
2 his opinion to that extent.

3 Furthermore, as far as the law is
4 concerned, the law provides in a general
5 way that the Court must present the law
6 and if, in presenting a conclusion to you,
7 the expert witness, in addition to making
8 certain assumptions about what the facts
9 were in the case made certain assumptions
10 about what the law is or was and you
11 find that his assumptions about what the
12 law is are different from what the Court
13 charges to you, then you must accept the
14 direction of the Court on the law and
15 not the direction of the expert, and
16 again, it is up to you in making that
17 determination to determine how much of
18 the expert testimony you will accept,
19 how much you will reject. Those are
20 considerations based upon your careful
21 analysis of the testimony in the case,
22 careful analysis of all of the testimony
23 and exhibits in the case and your under-
24 standing of what the law is as I charge
25 it to you.

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1 In this case, you should consider
2 the testimony received from the experts
3 and give it such weight as you think it
4 deserves. If you should decide that
5 furthermore that the opinion of the
6 expert is not based upon sufficient
7 knowledge or experience of what the
8 contemporary community standards were in
9 our area in 1973, or if you should con-
10 clude that the reasons given in support
11 of the opinion are not sound, then you
12 may disregard or discount the opinion
13 to the extent that you feel to be justi-
14 fied under the circumstances.

15 In this case, the Government did not
16 call an expert witness on the issue of
17 whether the film was obscene, as I have
18 described it to you. The Government is
19 not required to establish by affirmative
20 expert evidence that the film is obscene
21 because, ladies and gentlemen, you have
22 had the opportunity to look at the film
23 and as far as judging what the community
24 standards are and what they other elements,-
25 whether the Government has proven beyond

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1 a reasonable doubt the other elements,
2 that is up to you to determine. However,
3 you should keep in mind in your analyzing
4 of all the evidence in the case the
5 Government, if it desired, if it chose,
6 could have called an expert to present
7 expert testimony if it desired.

8 The evidence in this case consists
9 of the sworn testimony of the witnesses
10 and all the exhibits which are introduced
11 into evidence. If there are some exhibits
12 which have not been marked and sent to
13 you, then that is not part of the record
14 in this case and you should not guess or
15 speculate about what that material may
16 be.

17 Unless instructed otherwise, anything
18 you may have seen or heard outside the
19 courtroom or outside the place where this
20 court has met during the case is not
21 evidence and must be entirely disregarded.
22 There were several newspaper accounts of
23 our going to see the film and so forth
24 and I found nothing objectionable in
25 that material, but any articles like that

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1 or any articles you may have read or
2 heard or any other, - anyone who has
3 related to you about, - I don't know
4 whether anyone has seen this film that
5 you know, but certainly any comments
6 or views that anyone else might have on
7 this particular film should certainly
8 be disregarded. You are to consider
9 only the evidence in the case, but in
10 your consideration of the evidence, you
11 are not limited simply to the bald state-
12 ments of what the witnesses testified
13 to.

14 You are permitted to draw from the
15 facts which you find have been proven
16 such reasonable inferences as you feel
17 are justified in the light of your own
18 experience. This may become important
19 in your analysis of whether or not the
20 film presented in a serious way any
21 artistic, scientific, political viewpoint.
22 You will remember, of course, again, the
23 evidence in the case, the arguments of
24 the lawyers in this respect about the
25 object of the film, what the film was

1 trying to display.

2 In determining whether the film you
3 saw is obscene, you should keep in mind
4 that you are only determining whether this
5 film is obscene within the meaning of the
6 law as I described it to you. While you
7 should apply the contemporary community
8 standards as they existed in December,
9 1973, you should not base your judgment
10 on whether this film is obscene by com-
11 paring it with other similar films which
12 were exhibited in this community in
13 December of 1973. That is, comparing
14 film by film. It is difficult to tell
15 you to do that and at the same time, tell
16 you to determine what the community
17 standards would be. Certainly, you may
18 take into account from the evidence in
19 the case and also from your common sense
20 viewpoint, what the community standards
21 were, what kind of films were shown, what
22 kind of books, as you recall Mr. Detsky's
23 arguments about what kind of books are
24 available at our book stores in our
25 community; book stores such as Ulbrich's

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1 here in the City of Buffalo or in your
2 book stores in your own community. This
3 you must take into account, all of this
4 mix, the kind of advertisements which are
5 in the newspapers which you see, the kind
6 of things that are going on, but you
7 cannot do it on a one-to-one basis, say,
8 "They let a particular film show in a
9 particular community, therefore, that
10 means that this film is okay or it is
11 not okay". You cannot do it one-to-one,
12 but in making your judgment about what
13 the community standards were, you must take
14 into account the entire film, the entire
15 picture of what kind of films were shown
16 and what kind of books were available
17 to be read. The fact that some films
18 quite obviously obscene are being
19 permitted, allowed or tolerated by local
20 law enforcement agencies in certain
21 areas and theatres does not thereby create
22 a community standard. You must look at
23 the community as a whole and again
24 averages, - when you say "average", that
25 means that some things may go beyond a

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1 certain line and others may fall within
2 a line and it is your judgment to try to
3 draw the line where the average is.

4 To review briefly, the Government is
5 required to prove three elements beyond
6 a reasonable doubt. First of all, that
7 the defendants or defendant used the
8 Greyhound Bus Company to transport this
9 film interstate. Secondly, that the
10 motion picture film, "The Healers" is
11 obscene, lewd, lascivious or filthy.
12 In that connection, remember that the
13 word "obscene" is limited to works which
14 taken as a whole appeals to the prurient
15 interest in sex which portrays sexual
16 conduct in a patently offensive way and
17 when taken as a whole do not have serious
18 artistic, literary, scientific or political
19 value.

20 In this regard, you must take the
21 picture as a whole and not part by part,
22 and in other words, there may be, if you
23 find there were one or two scenes which
24 violate the standard but when you take
25 the picture as a whole and if you do find

1 there is a serious literary or scientific
2 value to the film then, of course, the
3 statute would not be violated. It must
4 be measure' by 1973 standards or maybe
5 current standards if you find they are
6 still the same and not by your individual
7 tastes. The standards of the entire
community must be considered in determin-
9 ing the limits of candor in the descrip-
10 tion or representation of sex which are
11 acceptable in the community.

12 Contemporary community standards are
13 set by what is, in fact, accepted by the
14 community as a whole. That is to say
15 by society at large or adult people in
16 general and not by what some persons or
17 groups of persons may believe the
18 community as a whole ought to accept or
19 refuse to accept. It is a matter of
20 common knowledge that the customs change
21 and the community as a whole, may, from
22 time to time, find acceptable that which
23 was formerly unacceptable and not in-
24 frequently may find acceptable that which
25 some particular portion of the community

1 may define as an unacceptable appeal to
2 prurient interest. In determining con-
3 temporary community standards, you may
4 consider what, as shown by the evidence
5 in the case, appears in contemporary
6 magazines, books, newspapers, television,
7 motion pictures, novels and other media
8 communication which are freely available
9 in this Western New York community as
10 a whole.

11 I have said this to you before, but
12 I think it bears repeating; that people
13 differ widely in their tastes with regard
14 to the propriety of certain pictures.
15 What may appear to some people to be bad
16 taste or offensive may appear to be
17 amusing or entertaining to others.
18 Obscenity under the law is not a matter
19 of individual taste. The personal opinion
20 of a juror as to the material in question
21 here is not the proper basis for a deter-
22 mination of whether or not the material
23 is obscene. As stated before, the test
24 is how the average person of the community,
25 as a whole, would view the material

1 presented.

2 You should keep in mind as far as
3 your determining appeal to prurient
4 interest that the mere fact that a picture
5 of a nude woman may be sexually arousing
6 or have some appeal to prurient interest
7 does not meet the test. The appeal to
8 prurient interest must be the predominant
9 or principal appeal of the picture.
10 In other words, the principal appeal of
11 the picture must be to a loathsome or
12 morbid interest in sex as distinguished
13 from a candid normal interest.

14 Ladies and gentlemen, it will be your
15 job to go to the jury room, - I do not
16 think we will send the canisters down.
17 Is there some material on the canisters?

18 MR. BURNS:

Yes, your Honor.

19 THE COURT:

20 Perhaps so. All right. We will
21 send the canisters down. As I explained
22 to you when we were there and viewed the
23 film, that we will not view the film a
24 second time. If there is any other
25 evidence in the case which you believe is
necessary, if you do not think everything

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1 is there, let us know, but we will be
2 sure to send all the exhibits to you.
3 You recall there were several stipulations.
4 You may consider the stipulations just as
5 any other evidence in the case. Keep
6 in mind that you cannot find either de-
7 fendant guilty here unless you find him
8 guilty of each essential element of the
9 crime charged beyond a reasonable doubt.

10 I will now ask you to step into the
11 corridor for a minute while I find out
12 whether the attorneys have any additional
13 requests to charge or any exceptions to
14 the charge as given. Do you want to step
15 out with the Marshal.

16
17 (Jury escorted from the courtroom.)
18

19 THE COURT:

Mr. Burns.

20 MR. BURNS:

21 One matter, your Honor. I appreciate
22 that you advised that you would not charge
23 in the language from the Manarite case
24 regarding contemporary community standards
25 but I think that you did state that
contemporary community standards are set

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1 by what is acceptable to society at
2 large by adult people in general and I
3 take exception to that. I think it
4 narrows it to one classification of
5 people rather than the entire society
6 and I can appreciate the Court didn't
7 want to call too much emphasis to the
8 fact about children, but I think the
9 Court went too far in the opposite
10 direction.

11 THE COURT:

Thank you, Mr. Burns, but I will
12 not change the language. Mr. Detsky,
13 do you have anything?

14 MR. DETSKY:

Yes, your Honor. I respectfully
15 appreciate that your Honor has tried to
16 be very fair and very honorable in its
17 charge and I wonder now, if it is nec-
18 essary now to stress to the jury that
19 the words "prurient interest" mean a
20 filthy, loathsome, morbid interest in
21 sex and I don't think they fully under-
22 stood that from your Honor's discussion
23 because he involved it with other parts
24 of the charge.

25 I think also, if your Honor please,

1 I believe on Friday when we were before
2 your Honor, we spoke about the picture
3 lacks serious literary, artistic value
4 Your Honor, in his charge, says that they
5 must find that it has serious. I think
6 there is a difference between lacking
7 and has and also, your Honor said he
8 would explain to the jury a lack of
9 serious value means a lack of reasonable
10 situation of artistic or literary values
11 of the picture because we discussed whether
12 serious would be explained to the jury
13 which we did not do and so on that basis,
14 I am asking your Honor if he would con-
15 sider adding that to the charge he has
16 already made.

17 THE COURT:

I suppose it depends on how, as far
18 as talking about serious literary,
19 artistic, political or scientific value,
20 if you say that the Government has the
21 obligation of proving that it offends,
22 then they also have the obligation of
23 proving that it lacks serious literary,
24 artistic, political or scientific value.

25 MR. DETSKY:

Right, if your Honor please, but in

1 your instructions to the jury, I believe
2 on two or three occasions, you said
3 "You must find that it has serious".

4 THE COURT: All right.

5 MR. DETSKY: I think that that has, by dint of
6 that error, shifted the burden to me to
7 prove that is has when they have to prove
8 that it lacks and I think there is quite
9 a difference there and I would ask your
10 Honor also to explain the word "serious"
11 to the jury.

12 THE COURT: What do you say I should tell them?

13 MR. DETSKY: I think they may find when it says
14 "lack of serious", that a reasonable man
15 or woman would find it has absolutely
16 nothing in the film that is of any worth-
17 while nature.

18 THE COURT: I do not think that is a very good
19 definition of "serious". As I discussed
20 before, I asked you in the past, it is like
21 the word "reasonable", - I asked you for
22 a charge on "serious" before we began.

23 MR. DETSKY: Your Honor, I have looked up the
24 word - -

25 THE COURT: You were not able to help me then.

1 MR. DETSKY:

Because I have found no charge in
2 the books on that word "serious" and
3 I have looked and I have seen no Court
4 define it beyond what the Supreme Court
5 has done because it hasn't just arisen
6 and if your Honor recalls - -

7 THE COURT:

Could I look at the dictionary,
8 Mr. Detsky?

9 MR. DETSKY:

No.

10 THE COURT:

You do not want me to look at the
11 dictionary.

12 MR. DETSKY:

Because I don't think it is - -

13 THE COURT:

Do they mean what they said or did
14 they not mean what they said?

15 MR. DETSKY:

"Lack of serious value" means that
16 no reasonable man can accept it for any-
17 thing worthwhile. I don't think I can
18 pretend to be serious to you, but if you
19 feel from a reasonable point of view that
20 there is nothing serious about it as a
21 reason person, you are now saying what
22 I am saying, it has no serious content
23 whatever. That means that as a reasonable
24 man, you have concluded that I have said
25 nothing worthwhile.

1 THE COURT:

2 They must find that when you get
3 right down to the facts here of the case
4 is the jury obliged to find that the
5 farcical elements here are mere gloss,
6 they mean nothing at all, I suppose that
7 would be it. What do you say about this,
8 Mr. Burns?

9 MR. BURNS:

10 Your Honor, my objection is slightly
11 different. We discussed this at some
12 length last Friday and obviously, I am
13 sure Mr. Detsky tailored the remarks
14 in his summation to what the Court told
15 us it was going to charge and it is my
16 understanding, - and so did I, of course,
17 but it was my understanding before you
18 charged that you weren't going to expand
19 the word "serious" for lack of any better
20 definition, so I adhered to my remarks
21 as to that, and also I find absolutely
22 no authority for Mr. Detsky's proposition
23 that "serious" means what he says it
24 means. In fact, I think to the contrary
25 He would have you go back to the Roth
Memoirs test which certainly is not the
law.

1 THE COURT: That is true. I think your explanation goes to the Roth case.

2
3 MR. DETSKY: Well, they say "utterly" in Roth
4 Memoirs, it was "utterly without re-
5 deeming social value, utterly", and I
6 am asking your Honor simply to say that
7 it was the duty of the Government to prove
8 that it lacked absolutely any serious
9 value whatever.

10 THE COURT: why don't I tell them that the
11 Government has the burden of proving that
12 element.

13 MR. DETSKY: Right, but my objection came when
14 you said "does the picture have", and there
15 is a difference.

16 THE COURT: I will explain that. I will say the
17 burden in this instance must be upon the
18 Government to prove beyond a reasonable
19 doubt as to any element.

20 MR. DETSKY: Right.

21 THE COURT: Have the jury come back.

22 MR. DETSKY: Your Honor, will you also charge
23 "prurient interest" so they understand
24 it?

25 THE COURT: Pardon?

1 MR. DETSKY:

"Prurient interest".

2 THE COURT:

As far as that is concerned, I believe I have said enough about it. I refuse to charge further on that.

3
4
5
6 (Jury returns to the courtroom.)

7
8 THE COURT:

Ladies and gentlemen, you will recall that I have explained to you that one of the things that the Government, - assuming that the other elements are satisfied, the Government also has the burden of proving that the work taken as a whole lacks serious literary, artistic, political or scientific value. That is a burden upon the Government. It does not shift to the defendants. There is no burden that can be put on the defendant to explain that the work, in fact, did have serious literary, artistic, political or scientific value. He may, if he desires and he did in this case offer evidence. That does not mean that then the burden was shifted. The burden of proving this beyond a reasonable doubt

1 that the work taken as a whole lacks
2 serious literary, artistic, political or
3 scientific value remains upon the
4 Government. It is their burden to prove
5 it. We have discussed other portions of
6 the charge and I refuse to charge further.
7 Mr. Robinson, will you step up, please.

8
9 (One male and one female deputy
10 United States Marshals sworn as custodians
11 of the jury.)

12
13 THE COURT:

Will the two alternate jurors step
14 down, please, for a minute. Ladies and
15 gentlemen, you may go with the Marshal to
16 begin your deliberation. The exhibits
17 will be sent to you in the jury room.

18
19 (Jury retires to commence its
20 deliberation at 10:44 p.m.)

21
22 THE COURT:

Mrs. Marshal and Mr. Concialde, the
23 case has now been submitted to the other
24 jurors. It happens so seldomly that I
25 do not think it is a problem, but could

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1 you simply tell Mr. White where you would
2 be during the day so he can get in touch
3 with you in case one of the other jurors
4 becomes ill or there is some other
5 problem. Can you do that, and then in
6 that event, we may ask you to come back
7 and participate in the deliberation in
8 this case. Mrs. Marshal, after this
9 case is finished, you will be excused,
10 so in the meantime, just conduct yourselves
11 as if you are still members of the panel
12 and do not talk to anybody about the
13 lawsuit until you have word that it is
14 completed.

15 Mr. Detsky and Mr. Burns, meet
16 with Mr. White so that you can agree as
17 to what exhibits should be given to the
18 jury and could you step up and see Mr.
19 White and also, Mr. Detsky, you are
20 going to be about in the courthouse in
21 case the jury has a question. If you
22 go anyplace, tell Mr. White.

23 MR. DETSKY:

If I go anywhere, it will be just
24 down for coffee.

25 THE COURT:

All right. We will be in recess.

1 Recess taken at 10:46 a.m. pending
2 deliberation of the jury.]
3

4 * * * * *

5
6
7 PROCEEDINGS:

After recess, 11:34 a.m.

8 APPEARANCES:

As before noted.

9
10 (Defendant present.)

11 (Jury present.)
12

13 THE COURT:

In United States against
14 Demetroules, et al, the jury is in the
15 box and defense counsel, Mr. Detsky is
16 here and the defendant, Mr. Demetroules
17 is here and Mr. Burns for the Government.

18 Ladies and gentlemen, I have a note
19 from you. It reads "Is it necessary for
20 NMD to be aware that the bus was routed
21 through New Jersey to be guilty of
22 interstate commerce law", and the answer
23 is "yes". You remember in my charge
24 I explained to you that the corporation
25 must act through its agents and its

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1 officers and the knowledge that they had,
2 if any, it is up to you to find. If they
3 had the knowledge that the bus was, or
4 they had the knowledge that the material
5 was being placed on the bus, that is
6 sufficient. It is not necessary that the
7 corporation know that whatever the route
8 was that the bus was going to follow as
9 long as they knew that the package was
10 going to be delivered, to be shipped
11 from New York City to Buffalo, that is
12 enough. It is not necessary that they
13 knew that the actual route was through
14 New Jersey. That is a separate considera-
15 tion. I think that you should now be
16 able to go back and continue your delibera-
17 tions.

18 MR. BURNS:

Your Honor, can we approach the
19 bench before they leave?

20
21 (Off the record sidebar conference
22 held between Court and counsel.)

23
24 THE COURT:

I am afraid I was confusing. The
25 question "Is it necessary for NMD to be

A55

1 aware that the bus was routed through
2 New Jersey to be guilty of interstate
3 commerce law". Of course, as you know,
4 when you say "to be guilty of interstate"
5 there is more to this than interstate
6 commerce, but I think what you mean is
7 is it necessary for NMD to be aware that
8 the bus was routed through New Jersey
9 and the answer to that is "no". I said
10 "yes" before and I was mistaken. The
11 answer to that is "no".

12 Now I think you should be able to
13 go back and continue your deliberation.
14 Thank you.

15
16 (Jury retires to resume its
17 deliberation at 11:37 a.m.)

18 * * * * *

19
20
21 PROCEEDINGS:

After recess, 12:54 p.m.

22 APPEARANCES:

As before noted.

23 (Defendant present.)

24 (Jury present.)
25

United States Court of Appeals
for the Second Circuit

United States of America,

Plaintiff-Appellee,

against

Nicholas Demetroules and NMD Film Distributing Co., Inc.,

Defendants-Appellants.

AFFIDAVIT
OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 25 Elliott Place, Bronx, New York
That on December 20, 1976, he served 2 copies of Brief
on and 1 Copy of Appendix

Theodore Burns, Esq.,
Assistant U. S. Attorney,
United States Courthouse,
Buffalo, New York, 14202.

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
20th day of December, 1976.

BEST COPY AVAILABLE